

US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION 7  
 901 NORTH FIFTH STREET  
 KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	CONSENT AGREEMENT
	)	AND FINAL ORDER
	)	
PETERSEN-BUBKE, LLP.	)	
	)	
Respondent.	)	
	)	Docket No. CWA 07-2012-0010
Proceedings under Section 309(g) of the	)	
	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
	)	
	)	
	)	

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**CONSENT AGREEMENT AND FINAL ORDER**

The United States Environmental Protection Agency, Region 7 (EPA) and Petersen-Bubke, LLP (Respondent), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order. This action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

This Consent Agreement and Final Order completely and finally settles all civil and administrative penalty claims and causes of action set forth below for Respondent's alleged discharges of pollutants into the Rush Creek and its tributaries, waters of the United States, in Monona County, Iowa.

## ALLEGATIONS

### Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties, instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation (CAFO) into the navigable waters of the United States without obtaining the necessary permit(s) required by Section 402 of the CWA, 33 U.S.C. § 1342.

### Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

4. The CWA prohibits the unpermitted discharge of “pollutants” by any “person” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.

6. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

7. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

8. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(3).

9. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation that stables or confines more than “1,000 cattle other than mature dairy cows or veal calves.”

10. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

11. The Iowa Department of Natural Resources (“IDNR”) is the agency within the state of Iowa with the authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the EPA to commence an action for administrative penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

#### Factual Allegations

13. Respondent owns and operates an open cattle feedlot (hereinafter, the “Facility”) that is located in the Southeast ¼ of Section 35, in Township 85 North, Range 42 West, Monona County, Iowa.

14. On March 16, 2011, EPA personnel conducted a compliance evaluation and inspection of the Facility. During the inspection, EPA’s inspectors observed flow paths and swales that carry process wastewater pollutants from the Facility into Rush Creek during significant rain events.

15. At the March 16, 2011, inspection the Facility was confining approximately 1,050 cattle. Inventory records document that the Facility confined greater than 1,000 head of cattle, for two of the twelve months before the inspection. The number of cattle confined and fed at the Facility was greater than 1,000 for 45 days or more during a twelve month period, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. The EPA issued an Administrative Compliance Order (ACO) on May 10, 2011, requiring the Respondent, to, among other things, reduce the number of cattle at the facility, unless the Facility is able to prevent all discharges to waters of the United States or obtain a NPDES permit. Based on information provided in accordance with the ACO, Respondent has reduced the cattle inventory to below 1,000 head of cattle and is in the process of constructing Livestock Waste Management Controls.

17. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.

18. The Facility confined and fed or maintained cattle for a total of forty-five (45) days or more in any twelve month period at all times relevant to this Consent Agreement and Final Order.

19. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas at all times relevant to this Consent Agreement and Final Order.

20. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

21. Rush Creek and its tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2.

22. Rush Creek flows within and through the boundaries of the Facility.

23. Based on aerial photographs taken before the inspection and snowfall data and temperature data collected after the inspection, the EPA determined that the Facility discharged for two days.

24. At all times relevant to this Consent Agreement and Final Order, Respondent's Facility was a Large CAFO as that term is defined in 40 C.F.R. §122.23(b) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. Respondent had not applied for a NPDES permit at any time relevant to this action.

26. At all times pertinent to this Consent Agreement and Final Order, the flow of wastewater from Respondent's Facility to the Rush Creek constituted unauthorized discharges of pollutants from a point source to waters of the United States. These were violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations. Furthermore, Respondent's failure to obtain an NPDES permit for the Facility was also a violation of Sections 308 and 402 of the CWA, 33 U.S.C. §§ 1318 and 1342.

#### **CONSENT AGREEMENT**

27. Respondent admits the jurisdictional allegations in this Consent Agreement and Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement and Final Order.

28. Respondent neither admits nor denies the factual allegations contained in this Consent Agreement and Final Order.

29. Respondent waives any right to contest the allegations as well as its right to appeal the Final Order accompanying this Consent Agreement.

30. Respondent and Complainant each agree to bear their own costs and attorney's fees.

31. Nothing in this Consent Agreement and Final Order shall alter or otherwise effect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

32. This Consent Agreement and Final Order addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

33. Respondent certifies by the signing of this Consent Agreement and Final Order that to the best of its knowledge, Respondent is in compliance with Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, with respect to the facility located in the Southeast ¼ of Section 35, in Township 85 North, Range 42 West, Monona County, Iowa.

34. The effect of settlement described in paragraph 32 above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 33 above, of this Consent Agreement and Final Order.

35. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of Ten Thousand Dollars and No Cents (\$10,000.00) as set forth in Paragraph 1 of the Final Order.

36. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

### **FINAL ORDER**

#### **Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this Consent Agreement and Final Order, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Ten Thousand Dollars and No Cents (\$10,000.00) due within thirty (30) days of the effective date of this Consent Agreement and Final Order.

2. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest.

3. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000.

This payment shall reference docket number CWA-07-2012-0010.

Copies of the check shall be mailed to:

Sara Hertz Wu  
Assistant Regional Counsel  
U.S. Environmental Protection Agency – Region 7  
901 North 5th Street  
Kansas City, Kansas 66101;

and to

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### **Parties Bound**

5. This Final Order portion of this Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

#### **General Provisions**

6. Notwithstanding any other provision of this Consent Agreement and Final Order, the EPA reserves the right to enforce the terms of the Final Order portion of this Consent Agreement and Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this Consent Agreement and Final Order.

8. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

10. The headings in this Consent Agreement and Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement and Final Order.



COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

\_\_\_\_\_  
Date

\_\_\_\_\_  
Karen A. Flournoy  
Director  
Water, Wetlands and Pesticides Division

\_\_\_\_\_  
Sara S. Hertz Wu  
Assistant Regional Counsel

RESPONDENT:  
PETERSEN-BUBKE, LLP.

\_\_\_\_\_  
Date

\_\_\_\_\_

Name (Print) \_\_\_\_\_

Title \_\_\_\_\_

IT IS SO ORDERED. This Final Order shall become effective immediately.

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Robert Patrick  
Regional Judicial Officer

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Date

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Consent Agreement and Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Mr. Normal Petersen  
Mr. Joel Bubke  
Petersen-Bubke, LLP  
43626 160<sup>th</sup> Street  
Mapleton, Iowa 51034

Mr. Eldon McAfee  
Beving, Swanson & Forrest, P.C.  
321 E Walnut Street, Suite 200  
Des Moines, Iowa 50309

Mr. Ken Hessenius  
Field Office Supervisor, Field Office #3  
Iowa Department of Natural Resources  
1900 North Grand Avenue  
Spencer, Iowa 51301.

\_\_\_\_\_  
Date